B. Commission Regulation is Undesirable Because it Would Interfere with Effective On-the-Spot Management.

Not only is government intervention unnecessary, since property owners are already taking steps to ensure that telecommunications service providers can serve their tenants and residents, but it is undesirable. Such intervention could have the unintended effect of interfering with effective, on-the-spot property management. Building owners and managers have a great many responsibilities that can only be met if their rights are preserved, including maintaining buildings in good repair; compliance with safety codes; and ensuring the security of tenants, residents and visitors. Needless regulation will not only harm our members' interests but those of tenants, residents, and the public at large.

1. Maintenance Issues.

The installation of an antenna on a building roof can create serious maintenance issues, which can ultimately become safety problems. For example, drilling holes in a roof to mount an antenna and run cable to a user's premises can lead to leaks and water damage if the holes are not properly sealed. In the case of a shopping center or mall, maintenance of the roof is one of the largest single maintenance concerns because large flat roofs are prone to leaks and other problems. Shopping center owners therefore carefully control antenna installations to reduce this type of problem. The consequences are not trivial, as leaks may not be immediately apparent, and may cause damage to the roofing material, the building structure, and other property. Any

resulting damage is the landlord's responsibility to repair. The proliferation of antennas on roofs would also cause an increase in foot traffic on roofs by service and installation personnel. Roofs are not designed to carry a lot of foot traffic or a lot of equipment that requires penetration of the roof, and the increased wear and tear can cause additional maintenance problems and reduce the useful life of the roof by one-half. Declaration of Stanley R. Saddoris, attached as Exhibit B ("Saddoris Decl.")

Antennas mounted directly on a wall also may require the drilling of holes; if improperly sealed, water seeping into the holes may create structural deficiencies. There are many mechanisms that could cause such damage, including expansion upon freezing, corrosion of metal mounting elements, seepage into the interior of a building, or weakening of concrete through chemical reaction with substances carried in by the water. All of these possibilities will create new maintenance and repair costs that building owners will have to pay.

2. Safety considerations; code compliance.

The maintenance issues described above may lead to safety hazards and building and fire code violations. For instance, the weight or wind resistance of an antenna installed improperly on a balcony railing may weaken the railing, thus creating a safety hazard. Antennas may also cause injuries and property damage if they are blown off their mountings in severe weather. See Comments of Compass Retail, Inc. (dated April 12, 1996) herein.

Building owners are the frontline in the enforcement of fire and safety codes, but they cannot ensure compliance with code requirements if they cannot control who does what work in their buildings, or when and where they do it. For the Commission to limit their control would unfairly increase the industry's exposure to liability and would adversely affect public safety.

For example, building and fire codes require that certain elements of a building, including walls, floors, and shafts, provide specified levels of fire resistance based on a variety of factors, including type of construction, occupancy classification, and building height and area.

The same applies to all other codes with which a building owner must comply. See, e.g., Article 800 (Communications Circuits) of the National Fire Protection Association's National Electrical Code (1993 ed.), specifying insulating characteristics, firestopping installation, grounding clearances, proximity to other cables, and conduit and duct fill ratios. Technicians of any single telecommunications service do not have all the responsibilities of a building owner and cannot be expected to meet those responsibilities. Yet the building owner is ultimately responsible for any code violations. Commission regulation in this area could thus have severe unintended consequences for the public safety. See Comments of the Real Estate Board of New York, Inc. (dated April 11, 1996) herein.

3. Occupant security.

Building operators are also concerned about the security of their buildings and their tenants and residents, and in certain circumstances may be found legally liable for failing to protect people in their buildings. Telecommunications service providers, however, have no such obligations. Service technicians may violate security policies by leaving doors open or admitting unauthorized visitors; they may even commit illegal or dangerous acts themselves. For example, there have been instances of break-ins conducted in shopping centers through the roof of the building. Thus, controlling access to shopping center roofs is very important. The commenting associations' concern is that in requiring building operators to allow any service provider or tenant to install an antenna at will, the Commission may specifically grant -- or be interpreted as granting -- an uncontrolled right of access by service personnel.

4. Effective management of property.

Preempting lease restrictions and building rules regarding antenna installation would raise a number of management issues. For example, shopping center managers control access to the roofs of their buildings very strictly, but, as noted above, such restrictions would apparently be deemed preempted. See Saddoris Decl. Contractors generally must sign in and, unless the manager knows a contractor well, will be accompanied while they are in the building. These rules apply to providers of other services as well. Generally speaking, out of concern for the safety of

tenants and their customers, and to limit their liability in case of an incident, building operators try to limit the number of service personnel who have access to the building to the minimum required. For instance, as much as possible, they try to contract only with one cleaning crew and one HVAC contractor. Allowing tenants to install their own antennas at will makes it much more difficult and costly to limit such access.

In addition, the technical limitations of satellite technology will create management problems for apartment operators because not all residents may be able to receive certain services. When residents on the south side of a building start subscribing to DBS, but residents on the north side cannot because there is no place to position an antenna to receive the signal, landlords will have to deal with the complaints. They will be powerless to address the situation, but will suffer increased costs as angry residents place additional demands on management or move to other buildings.

The building operator is the only person with the incentive to protect the interests of all occupants in a building. Individual occupants are only concerned with the quality of their own service, and service providers are only concerned with the quality of service delivered to their own customers. The Commission cannot possibly police all of these issues effectively. Consequently, building operators must retain a free hand to deal with service providers as they see fit. If one company consistently performs sloppy work that adversely affects

others in the building, the building owner should have the right to prohibit that company from serving the building. Otherwise, the building owner will be unable to respond to occupant complaints and will face the threat of lost revenue because of matters over which it has little control.

C. The Real Estate Market is Free and Competitive, and Building Owners Have no Incentive To Impose Unreasonable Restrictions on Their Tenants and Residents.

Building owners benefit from satisfied residents and profitable tenants. Consequently, they have an incentive to establish policies that promote the well-being of all tenants and residents. For example, the shopping center industry has developed an arrangement for controlling the number of antennas on shopping center roofs, while ensuring that tenants get the service they need. Tenants are required to share antennas unless they can show they have special needs or requirements or generate sufficient traffic to warrant a separate antenna. The shopping center managers lease roof space to national service providers who then contract with the individual retailers to provide data transmission services. See Saddoris Decl.

The antenna space leases used by shopping center managers are similar in terms to their retail tenant leases. The typical shopping center lease for retail space provides for a base rent, plus a percentage of the tenant's revenues over a breakpoint. Antenna space leases in shopping centers also provide for a small base rent, plus a percentage of revenues once enough retailers

are using the antenna to cover the satellite service provider's costs.

If antenna space were not leased in this way, all of a center's tenants would have to pay for increased maintenance costs resulting from the presence of the antennas through their share of common area maintenance expenses, which are paid by all tenants, based on their gross leasable area in addition to their monthly rent. In other words, by leasing antenna space, landlords reduce the common area maintenance expenses of all tenants, and allocate expenses arising from the antennas only to those tenants that use the antennas. This is particularly beneficial to smaller, local, and regional retailers who do not rely on satellite communications as extensively as the national tenants. Generally speaking, tenants understand the landlord's concerns and recognize that they are trying to hold down costs and improve and maintain conditions in the center for all. Landlords also make every effort to accommodate tenants who have special needs. For example, if a tenant, such as a department store, can show that it has special needs or arrangements or its level of use warrants its own antenna, the building manager will allow the tenant to install an antenna. It is in the landlord's own economic interests to accommodate tenants and help then cut their costs, because increasing the tenants' revenue ultimately increases the landlord's.

In short, the associations' members are fully capable of meeting their obligations to their tenants and residents. As

keen competitors in the marketplace, they will continue to ensure tenants and residents have the services they need. It is unnecessary for the government to interject itself in this field, and any action by the government is likely to prove counterproductive.

D. The General Services Administration's Rules Regarding Placement of Antennas on Federal Property Demonstrate the Legitimacy of the Concerns of Private Property Owners.

The Commission's proposal departs from the policy of the Executive Branch of the U.S. government. Just weeks ago, the General Services Administration ("GSA") issued "Government-Wide Procedures for Placing Commercial Antennas on Federal Properties," governing placement of antennas for mobile services.[5] These procedures are required by Section 704 of the 1996 Act, and demonstrate that the federal government as landlord is concerned with exactly the same issues as private landlords.

For example, the GSA procedures state that requests for antenna placements should be granted, but only "absent direct unavoidable conflict with the department's or agency's mission, or the current or planned use of the property, rights-of-way and easements in question."

In addition, such antenna sitings are to be in accordance with federal, state and local laws and consistent with "public health and safety concerns, environmental and aesthetic concerns, preservation of historic buildings and monuments, protection of

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[5] 61 Fed. Reg. 14100 (Mar. 29, 1996).

natural and cultural resources, protection of national park and wilderness values, [and] protection of National Wildlife Refuge systems . . . ." Id.

Finally, agencies have discretion to reject inappropriate siting requests, and are required to charge fees based on market value. Id.

The federal government, in its role as landlord, is concerned with safety and aesthetic concerns, just as private landlords are, and retains the discretion to reject inappropriate requests, just as private landlords do. The federal government also will charge the market rate in return for the right to install an antenna. Under these circumstances it clearly would be unreasonable, arbitrary, and an abuse of discretion for the Commission to preempt nongovernmental limitations on the placement of satellite dishes on private property.

Conclusion

The Commission should recognize that it lacks jurisdiction to prohibit building owners from controlling the placement of satellite dishes on their property and that, in any event, there

are sound and persuasive reasons why the Commission should not prohibit such nongovernmental restrictions.

Respectfully submitted,

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April 15, 1996

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ATTACHMENT 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	IB Docket No. 95-59
	)	DA 91-577
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	45-DSS-MISC-93

JOINT REPLY COMMENTS OF
NATIONAL APARTMENT ASSOCIATION
BUILDING OWNERS AND MANAGERS ASSOCIATION
NATIONAL REALTY COMMITTEE
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL MULTI HOUSING COUNCIL
AMERICAN SENIORS HOUSING ASSOCIATION
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS

Introduction

The entire real estate industry strongly supports the positions taken in our initial comments. We note that before the comment period closed on April 15, 1996, the Commission had received comments from approximately 84 firms and associations connected with the real estate industry, all fundamentally supporting the positions taken by the joint commenters. When comments received after the deadline are included, over 90% of the approximately 135 submissions responding to the March 11, 1996, Report and Order and Further Notice of Proposed Rulemaking (the "FNPRM") were filed by owners and managers of commercial and residential properties. The prospect of the Commission's intervening in the ownership and management of real property is enormous. The Commission should consider the magnitude of the

real estate industry's opposition to any Commission regulatory intrusion into the competitive real estate market.

I. THE PROPOSED RULE IS TOO BROAD BECAUSE CONGRESS DID NOT INTEND FOR THE COMMISSION TO ATTEMPT TO PREEMPT ALL NONGOVERNMENTAL RESTRICTIONS.

The Commission will overstep its legal authority if it preempts all nongovernmental relationships that affect the placement of satellite antennas. Even the satellite industry commenters have not argued that the proposed rule extends to leases and other private rights. The Commission should narrow the proposed rule to prohibit only governmental restrictions that completely prevent the reception of video programming.

A. Section 207 Does Not Apply to Private Contractual Restrictions on the Placement of Satellite Receiving Antennas.

In our initial comments, the joint commenters argued that the proposed rule was too broad because the use of the term "nongovernmental" could be interpreted as including private contractual restrictions. Even the comments filed by the satellite broadcasting industry implicitly support this conclusion. The Satellite Broadcasting and Communications Association of America ("SBCA"), DIRECTV, Inc., and other satellite industry commenters refer to "restrictive covenants or home-owners' association rules," Comments of SBCA at 14. The satellite industry's comments introduce no evidence of any Congressional intent to preempt leases governing the occupancy of multiple dwelling units or to preempt any restrictions imposed by owners of commercial properties. Thus, the satellite industry

commenters have confirmed by their argument that Congress did not intend to preempt such nongovernmental restrictions.

Nevertheless, the language of the proposed rule is so broad that it could be construed as including real property rights and other private contractual arrangements. If the Commission neglects its legal duty and fails to remove this ambiguity, the satellite industry will surely attempt to enforce that interpretation. For example, some commenters have already asked the Commission to expand its preemption of nongovernmental rules on the grounds that it does not reach far enough. These commenters concede that the proposed rule is ambiguous and they fear the rule might be interpreted as permitting some restrictions to remain in effect.

To make our position clear, the real estate industry sees nothing in the legislative history or the text of the statute to justify intrusion into private constitutional rights or contractual obligations. Indeed, we note that Section 207 never uses the broad, general term "nongovernmental" to describe the restrictions that are to be prohibited. The scope of the proposed rule should be limited to those restrictions intended to be prohibited by Congress, and no others.

B. By Restricting a Property Owners' Right To Control the Use of Its Property, the Proposed Rule Effects an Economic Taking.

We noted in our initial comments that the proposed rule would effect a taking by requiring landlords to permit the physical placement of antennas on their property without their

consent. The proposed rule also appears to violate the Fifth Amendment in another way. If property owners cannot control the placement of antennas on their property, it follows that they cannot obtain compensation when such antennas are installed. Currently, property owners can and do lease "roof rights," just as they lease other parts of their property. See Comments of NAA, et al. at 21-23. The proposed rule would apparently treat any attempt to obtain compensation as a regulation to be preempted, thus effecting an economic taking under the Fifth Amendment because of the vitiation of the property owner's economic interest. See Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994).

C. Prohibiting the Enforcement of Restrictive Covenants Would Also Constitute an Economic Taking.

The statute does not mandate preemption of all nongovernmental restrictions. Without such a mandate, the Commission must avoid any unauthorized preemption. The Commission must reject the satellite industry's arguments that restrictive covenants are preempted. Such a claim puts the Commission immediately at odds with Fifth Amendment precedents, as discussed above. Such covenants grant property rights that significantly affect the value of the property at issue.

Purchasers of condominiums and other residential properties acquire those properties knowing that they are governed by covenants. In many states such covenants are required to be furnished to the purchaser prior to settlement, and, in any event, they are a matter of public record which a routine title

search would reveal. Indeed, the existence of such covenants is often a positive incentive for a purchaser to buy, because they help create and preserve the character of an area. In the process, the existence of covenants and similar restrictions enhances the value of property and they "run with the fee." Thus, a purchaser has a vested economic interest in the covenants, so long as the provisions are themselves constitutional. Preempting such quasi-governmental restrictions will reduce the value of the affected properties, and constitute an economic taking of an interest in real property.

D. Section 207 Only Prohibits Restrictions That Completely Prohibit the Reception of Video Programming.

The most that can be said about Section 207 is that it authorizes the Commission, in its discretion, to adopt rules preempting "regulations" that completely prevent a viewer from receiving the programming in question. As we argued in our initial comments, Congress used the word "impair" to mean "prevent." Therefore, the language of the statute refers only to those restrictions that entirely prevent a person from receiving satellite video programming. The Commission must narrow the scope of the proposed rule by limiting it to restrictions that actually and completely prevent the reception of video programming.

II. THE SATELLITE INDUSTRY HAS FAILED TO DEMONSTRATE THAT NONGOVERNMENTAL RESTRICTIONS PRESENT A SERIOUS PROBLEM.

In an attempt to show the presumed pervasiveness of the alleged problem, SBCA lists some homeowners associations whose

rules restrict the installation or placement of satellite antennas. We note that out of the thousands of homeowners associations in the country, SBCA has listed only 16. This brief list is hardly evidence of an enormous problem that requires the Commission to transform itself into a national Contract and Covenant Review Board. Centralized, one-size-fits-all remediation will gravely injure traditional private property relationships and is not required to fulfill the purposes of the statutes.

III. THE PROPOSED RULE WOULD MAKE IT DIFFICULT OR IMPOSSIBLE FOR BUILDING OPERATORS TO COMPLY WITH SAFETY CODES ESTABLISHED BY INDEPENDENT BODIES FOR PURPOSES UNRELATED TO RESTRICTING ACCESS TO PROGRAMMING.

The FNPRM indicates that the Commission believes nongovernmental restrictions are grounded solely in aesthetic considerations. We again remind the Commission that safety and habitability are the dominant restrictions the proposed rule would preempt. Leases normally require compliance with local safety codes, such as maintenance and installation under a landlord's supervision, specific building code standards for work done by the tenant or resident, and requiring qualified contractors to engage in an activity. Preempting such lease terms would make it difficult -- and in some cases impossible -- for the building operator to comply with fire, electrical, earthquake, hurricane and other safety codes. The safety codes themselves have been developed by responsible, professional organizations to deal with historical, real problems. The

Commission must recognize it does not have the expertise to judge safety and building code issues.

The National Building Code, standard in most jurisdictions, imposes restrictions on the manner in which antennas may be installed. These rules "are essential to ensure the structural integrity of the applicable dish antenna installations." Petition for Reconsideration of the National League of Cities, et al., at Attachment 1 (filed April 17, 1996).

Does the Commission really "presume" that "wind load" criteria on the Kenai peninsula of Alaska or building setback distances from television antenna towers in Florida should be preempted? Every jurisdiction adopts its own rules to address specific local concerns. "In Florida, we are very conscious of the extensive damage inflicted on structures and objects, such as antennae mounted on roofs and walls of buildings and antennae installed on the ground in populated areas, as evidenced in storms like Hurricanes Andrew (1992), Erin and Opal (both 1995)." Petition for Reconsideration of the Florida League of Cities (filed April 16, 1996).

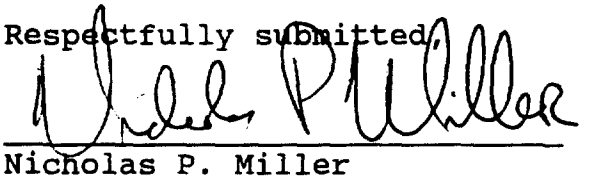
Therefore, the proposed rule is overbroad and should not be adopted. The proposed rule ignores legitimate concerns of property owners and makes it difficult or impossible for building operators to comply.

Conclusion

As the joint commenters urged in our initial comments, the Commission should recognize that it lacks jurisdiction to control

building owners' property rights and leases. The placement of satellite dishes on private property is, and should be, solely a matter between the parties. There are sound and persuasive constitutional, policy and practical reasons why the Commission should not prohibit such nongovernmental requirements. The satellite broadcasting industry stretches the statute for its own economic gains and ignores the broad interests that the Commission must protect. The real estate industry asks the Commission to recognize that there are legitimate legal and safety reasons to not regulate private contracts or impose physical burdens on private property.

Respectfully submitted,



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